No. 80-1196.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

CHESAPEAKE AND OHIO RAILWAY COMPANY, ET AL.,
PETITIONERS,

v.

ROBERT W. MESERVE AND BENJAMIN H. LACY, TRUSTEES OF THE BOSTON AND MAINE CORPORATION, DEBTOR,
RESPONDENTS.

REPLY BRIEF FOR THE PETITIONERS.

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Introduction.

In their brief in opposition to the Petition of the Chesapeake and Ohio Railway (the "C&O"), the Baltimore and Ohio Railroad Company (the "B&O"), and the Western Maryland Railway (the "Western Maryland"), Robert W. Meserve and Benjamin H. Lacy as Trustees of the Boston and Maine Corporation ("the Trustees") joined by The First National Bank of Boston and Malcolm W. Hall as Successor Indenture Trustees argue that the principle of *res judicata* bars consideration by this Court of questions raised in the Petition and that Petitioners' taking arguments are inconsistent with the decision in *Baltimore & Ohio RR* v. *United States,* 345 U.S. 146 (1953).

Because Petitioners believe both Respondents' arguments to be mistaken, they file this reply brief pursuant to Rule 22.5 of this Court.

The portion of the decision below for which Petitioners seek review concerned the classification of creditors denying Petitioners (and other railroads) such a priority for their per diem claims as would assure their eventual payment in full. Petitioners therefore refer to the decision below, 634 F. 2d 1359 (1st Cir. Oct. 6, 1980), Petition A1-A47, as the "classification" case, and to the earlier First Circuit decision which denied the railroads immediate payment—in advance of any decision on classification of creditors or a plan of reorganization—as the "immediate payment" case. 600 F. 2d 307 (1st Cir. 1979).

Argument.

I. The Principle of *Res Judicata* Does Not Bar the Questions Raised in the Petition.

A. *Petitioners' Constitutional Issue Was Not Presented Or Decided in the Immediate Payment Case.*

When in 1979 the First Circuit Court of Appeals affirmed the district court's decision that per diem claimants were not to receive an immediate payment from the estate of the Boston & Maine Corporation in advance of the division of creditors or the approval of a plan of reorganization, there remained open the possibility that per diem claims would be paid in full in the eventual classification of creditors and approval of a plan. The postponement of further consideration of per diem claims until the division of creditors was a decision "setting the time," 600 F. 2d at 310, not the amount, of per diem claims payment.

The decision was that per diem claims would not be separately and immediately paid but that consideration of their payment would be deferred until the whole range of claims on the debtor's estate was considered. The court characterized "*timing* of payment of pre-reorganization debts" as the "core issue" of that case (emphasis supplied). 600 F. 2d at 309. See also 600 F. 2d at 310 (scheduling), 313. Priorities in the sense of ranking the creditors of the estate were not determined in the district court decision which the First Circuit considered in its decision reported at 600 F. 2d 307.[1] See *In re Boston and Maine Corp.*, 468 F. Supp. 996, 999 (D. Mass. 1979). Nor was the related decision, awarding or denying creditors portions of their claims, made in the immediate payment case.

Therefore, the constitutional issue whether a taking of property was effected by the reorganization court's decision could not and would not be presented, nor would it be ripe for consideration until some decision denying payment of the per diem claims had been made. Such a denial did not occur until in the classification case the court assigned per diem claims to the lowest category of creditors' priorities, *In re Boston and Maine Corp.*, 468 F. Supp. 996, 1009 (D. Mass. 1979). That judicial action fixing the division of creditors determined that the pre-1953 rates paid by the Boston & Maine between 1953

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[1] It is specious to argue that because the district court classification decision was made March 12, 1979, and the immediate payment case arguments on appeal were heard by the Court of Appeals on April 5, 1979, that the legal questions of the classification decision by the district court were somehow to be imported into the appeal of the immediate payment decision. The two cases were separate. The appellants and the courts quite properly addressed them each in turn. That the district court decision in the classification case was made before the oral argument of the appeal of the immediate payment case was heard impairs the distinction between the cases not at all.

and 1969 would not be supplemented by payment of the increment between those rates and the rates which the Interstate Commerce Commission (the "ICC") determined to be reasonable rates for the claims Petitioners the B&O, the Western Maryland and others had lodged in their suit against the Boston & Maine in the federal district court in New York. After the classification decision, the best that Petitioners could hope for was payment of a small portion of their claim. In the district court hearing for the classification case and in their appeal from the district court decision, Petitioners duly raised the constitutional question posed by the assignment of that low priority and their consequent deprivation of full payment or any possibility of it.

Because the denial of immediate payment did not effect a taking, the First Circuit had no occasion to decide any constitutional questions in its 1979 decision. *Res judicata* therefore effects no bar to Petitioners' timely raising of the constitutional issue now that it is presented by the classification case.

B. *The Statutory Interpretations Made by the First Circuit below in the Classification Case Are Distinct from the Questions Decided in the 1979 Immediate Payment Case.*

In its 1979 decision that consideration of per diem claims should be deferred until all claims against the estate were being considered, the court did not determine that transportation policy forbade according to per diem claimants a creditor classification which would result in the eventual payment in full of per diem claims. It simply refused to schedule early payment of per diem claims as uniquely requiring immediate settlement without the necessity of addressing the competing claims of other creditors.

A year later, the court decided that the same reasoning could be invoked to justify a different decision: the assignment of a low priority among creditors to per diem claimants. The Petitioners have every right to seek review of that second decision and *res judicata* is no bar because the question decided was different.

II. Petitioners' Constitutional Arguments Are Consistent with the Decision of This Court in *Baltimore & Ohio RR* v. *United States*, 345 U.S. 146 (1953).

Respondents argue that a loss in the railroad's overall business must be shown before a taking without just compensation may be claimed in relation to undercompensation by more than a million dollars for the use of Petitioners' freight cars, and cite for the proposition *Baltimore & Ohio RR* v. *United States*, 345 U.S. 146 (1953) (the "B&O case") and four lower court cases. Opp. Br. 23. The same case law was cited in the decision below in support of the proposition that "a scheme of regulation that effects an appropriate public purpose may . . ., without violation of constitutional principle, entail random losses due to extrinsic factors." 634 F. 2d at 1364, Petn. 8-9.

Petitioners submit that the undercompensation for freight car use which they have suffered was systemic, not random, and was indeed a loss within the constitutional meaning of a taking as defined in *Chicago, Rock Island & Pacific Ry.* v. *United States*, 284 U.S. 80 (1931). The B&O case was not, in fact, a just compensation decision, but a due process decision. 345 U.S. at 148. Two rates were challenged there, one for carload lots of carrots with tops, the other for a limited group of other fresh vegetables such as string beans, lettuce and parsnips, both relating only to shipments from Texas to some (but not all other) states. The court made clear that the selec-

tion of these two individual rates from among all vegetable rates did not persuade it that the loss was significant in context:

> so long as a railroad is not caused by *such* regulations to lose money on its over-all business, it is hard to think that it could successfully charge that its property was being taken for public use "without just compensation." (Emphasis supplied.)

345 U.S. at 148. The "such" referred to the court's characterization of the rate as "a cheaper transportation rate for one vegetable than for another." The court clearly considered that compensability of vegetable rates as a whole were considered by the ICC. In the case for which Petitioners now seek review, the challenged rate is for *all* freight cars loaned to the Boston & Maine, not for piecemeal extracts from a lengthy rate schedule. It does not fall within the sweep of the *B&O dictum* on which Respondents rely.

Nor does the fact pattern or legal posture of Petitioners' case correspond to that of the other four cases cited by Respondents. *Western Air Lines, Inc.* v. *CAB,* 495 F. 2d 145 (D.C. Cir. 1974) was not a taking case considering constitutional issues nor was any loss found; the court noted there that "[t]he net result of the Board's action is likely to be a gain by all carriers." 495 F. 2d at 157. *Indiana Harbor Belt RR* v. *United States,* 510 F. 2d 644 (7th Cir.), *cert. denied,* 422 U.S. 1042 (1975), like the *B&O* case, concerned piecemeal objections to a freight car movements tariff: only movement to and from repair shops of empty freight cars was concerned. 510 F. 2d at 646. *Government of Guam* v. *FMC,* 329 F. 2d 251 (D.C. Cir. 1964) related only to the rate charged for ocean transport of bulk cement, a filler cargo accepted for carriage on a space-available basis. The court made short shrift of the argument that the bulk cement rate was noncompensatory because the economic function of the low charge for bulk

cement was to render the public service of tending to reduce the charges made to other shippers. 329 F. 2d at 254. Finally, Petitioners note that *Pan American World Airways, Inc.* v. *CAB*, 256 F. 2d 711 (D.C. Cir. 1958) viewed Pan Am's Tokyo business as a unit which could be separately considered from Pan Am's entire business in considering the fairness and reasonableness of Tokyo mail rates. The *Pan Am* court in fact required revision of the rate under constitutional attack because it did not fairly reflect the costs to the carrier of the Seattle-San Francisco mail transport from which the Postmaster General benefited.

Petitioners here are seeking the same sort of remedy Pan Am sought: compensation which fairly reflects the public transportation service rendered by the use of Petitioners' cars by the Boston & Maine. The rate at which Petitioners seek to be paid is one determined by the ICC after years of investigation, study and consideration. The effect of deciding that Petitioners and other similarly-situated railroads are entitled to fair compensation for use of their cars at the rates found by the ICC in *Chicago, Burlington & Quincy RR* v. *New York, Susquehanna & Western RR*, 332 I.C.C. 176 (1968) (the *Per Diem Rates* case) would be to confirm the administrative judgment about what constituted a fair, just and compensable rate for car hire. To deny the review which Petitioners request would be to let stand the undercompensation for car hire resulting from the maverick rate, never approved by any court or the ICC, at which the Boston & Maine chose to pay for freight cars Petitioners and other railroads were required to lend it.[2] In all the cases discussed above, the

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[2] It may be questioned whether the ICC has the power to limit the application of past rates administratively determined in the *Per Diem Rates* case to use *only* as a measure of damages in a particular law suit. The ICC's task in measuring those damages was to determine what rate, under the Interstate Commerce Act, would

effect of the decisions was to accord validity, constitutional or statutory, to rates administratively determined, with the single exception of the rate correction required in the *Pan Am* case. *Indiana Harbor Belt RR* v. *United States,* 510 F. 2d 644, 649-650 (7th Cir.), *cert. denied,* 422 U.S. 1042 (1975); *Western Air Lines, Inc.* v. *CAB,* 495 F. 2d 145, 155-158 (D.C. Cir. 1974); *Government of Guam* v. *FMC,* 329 F. 2d 251, 254 (D.C. Cir. 1964) (rate for bulk cement); *Pan American World Airways, Inc.* v. *CAB,* 256 F. 2d 711 (D.C. Cir. 1958) (Tokyo mail rate except San Francisco-Seattle mail carriage portion). It is that same deference to administrative expertise and judicial attention to fairness among carriers which the cited decisions achieve which Petitioners seek in this case.

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constitute a fair, just and compensable rate. See discussion of *Baltimore & Ohio RR* v. *New York, New Haven & Hartford RR,* 196 F. Supp. 724 (S.D. N.Y. 1961) in Petn. 7-8, n.6. The three-judge court which decided *Boston & Maine RR* v. *United States,* 297 F. Supp. 612 (D. Mass. 1969) commented on the ICC decision about past rates in the *Per Diem Rates* case by saying, "[B]y finding that specific rates would be 'the just, fair, reasonable and non-discriminatory rates,' the Commission indicated that any other rates would not meet that standard." 297 F. Supp. at 619. This interpretation by the three-judge court of the *Per Diem Rates* case as finding what constituted the statutory rate supersedes the ICC's comment (quoted in the decision below, 634 F. 2d at 1363, Petn. A6) about the limited significance of its findings. Petitioners submit that payment by the Boston & Maine at $2.00 per car per day for the period 1953-1969 could not be constitutionally just compensation when the ICC found rates averaging $2.41 per car per day were "just, fair, reasonable and non-discriminatory" for the years 1953 to 1965 and the formula which the ICC designed for the years 1966 forward resulted in rates as high or higher.

Conclusion.

For all these reasons, a writ of certiorari should issue to review the confirmation below of noncompensatory per diem payments made and to be made to Petitioners and other car-owning railroads for the use of their rolling stock by the Boston & Maine.

Respectfully submitted,

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Dated: March 4, 1981

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